N Indra a/p P Nallathamby v Public Prosecutor

HIGH COURT (SHAH ALAM) — CRIMINAL REVISION NO 43–38 OF 2009
YEOH WEE SIAM JC
8 OCTOBER 2009

Criminal Procedure — Revision — Application for — Search warrant issued by magistrate — Whether function of magistrate was a judicial function when issuing search warrant — Whether magistrate erred in issuing search warrant — Whether search warrant hinder completion of second post-mortem which was requested and paid for by deceased family

Criminal Procedure — Search warrant — Requirements of — Search warrant issued to seize documents, articles and samples of body parts — Whether s 51 of the Criminal Procedure Code must be applied first — Whether search warrant spent within time prescribed — Whether requirements of productions of seized materials to be produced before magistrate was fulfilled — Criminal Procedure Code ss 51 & 54(1)(a)

The applicant is the mother of Kugan a/l Anathan ('the deceased') who died while in police custody on 21 January 2009. The applicant was dissatisfied with the post mortem report on the deceased conducted by the Serdang Hospital. Subsequently, the applicant requested Pusat Perubatan University Malaya ('PPUM') to conduct a second post mortem on the deceased. PPUM agreed but on 6 April 2009 the police conducted a search on the Department of Pathology in PPUM in accordance to a search warrant that was issued by the Petaling Jaya Magistrate Court ('PJ Magistrate's Court') on the same day. The police seized documents, articles and samples of body parts of the deceased ('the samples') which were kept by a forensic doctor in PPUM. The applicant informed that the samples were required to be sent to a laboratory in Australia for toxicology test before the second post mortem report on the deceased could be completed. The applicant, on 12 August 2009 applied for a revision of the search warrant issued by the PJ Magistrate's Court. The applicant argued that (i) the police should have used s 51 of the Criminal Procedure Code ('CPC') before applying for search warrant; (ii) the second post mortem was requested and paid for by the family of the deceased; (iii) the search warrant was wrongly issued since the second post mortem had not been completed yet; and (iv) the function of the magistrate in issuing the search warrant was a judicial function and that the magistrate had erred in

issuing the search warrant. However, the public prosecutor submitted, inter alia, (i) that the search warrant dated 6 April 2009 was issued in accordance to s 54(1)(a) of the CPC; (ii) that the search warrant had already been executed and spent according to the limitation period imposed on the search warrant; (iii) the applicant's application was made under s 413 of the CPC and accordingly the seizure by the police pursuant to the search warrant had been reported to the magistrate; and (iv) that PPUM was the legitimate and appropriate owner to apply for the return of all the samples seized under the search warrant. It was recorded in the PJ Magistrate's Court that a search warrant under s 54(1)(a) of the CPC was signed by the Registrar of the Petaling Jaya Sessions Court ('the registrar') on 6 April 2009. The application by the police for a search warrant to be issued was addressed to the PJ Magistrate's Court. The summons were served to the Director General of PPUM and a doctor to submit the requested documents to the police. However, the PPUM and the doctor failed to comply with the requirement of the summons on the ground that the documents were privileged documents. The prosecution subsequently, applied for the search warrant under s 54(1)(a) of the CPC.

Held, allowing the application in part:

(1) There was no record to show that the PJ First Class Magistrate had exercised his judicial function under s 54(1)(a) of the CPC, to decide whether there was any reason to believe that the summons under s 51 of the CPC had not been complied with. The registrar who signed the search warrant had acted in her capacity as a second class magistrate and hence, was empowered to issue and sign a search warrant under s 83(b) together with s 83(a) of the Subordinate Courts Act 1948 (see paras 26 & 33).

(2) The registrar had exercise accordingly the judicial function of a second class magistrate under s 54(1)(a) of the CPC. The registrar had applied her judicial mind to the application by the police before deciding to issue the search warrant as the registrar had imposed two additional conditions upon the application of the search warrant namely; (i) the search and seizure must be conducted within three days from 6 April 2009; and (ii) that after the search the police were to produce all articles seized before the magistrate's court. The application for a revision was dismissed as the registrar's order issuing the search warrant was correct, legal and proper (see paras 36–37).

(3) Section 413 of the CPC relied upon by the prosecution does not apply to the situation of the case. The prosecution erred in its submissions to state that the property in this case had been reported to the magistrate who then ordered the police to hold the property until the investigation

was over. However, on record there was no proof that the magistrate had ordered that the police to hold the seized property (see para 38).

(4) It was clear that the police did not comply with the requirement in the search warrant signed by the registrar to search and 'produce the same forthwith before the Magistrate's Court'. The facts showed that within two days of the seizure which was 8 April 2009, a police officer had informed the registrar of his actions but he did not produce all the items before the magistrate's court. It was confirmed that the articles seized were not produced before the magistrate's court. The police officer had returned the search warrant together with the police reports in compliance with the last part of the conditions stated in the search warrant. However, the police officer failed to comply with the most critical or material part of the conditions in the search warrant, namely to produce all articles seized before the magistrate's court within three days from the date of search and seizure on 6 April 2009. The police hence, had acted in contravention of the conditions in the summons (see paras 48–49).

(5) The applicant had the locus standi in requesting the samples of the deceased's body parts since she was the mother of the deceased. The samples of the body parts belonged to the applicant's deceased son. All other documents or articles seized relate to the second post mortem of the deceased and the applicant was not seeking the seized articles be returned to her. The applicant applied for the samples and articles seized to be returned to the Department of Pathology, PPUM to enable the completion of the second post mortem procedures and issue a report on the deceased for the applicant (see para 57).

(6) The police are to produce before the magistrate's court before a first class magistrate all samples or specimens and articles seized pursuant to the search warrant for a decision as to whether such samples or specimens and articles are to returned forthwith to PPUM or to allow the police to have continued safe custody of the same (see para 59).

[Bahasa Malaysia summary

Pemohon merupakan ibu kepada Kugan a/l Anathan ('si mati') yang meninggal dunia semasa dalam tahanan polis pada 21 Januari 2009. Pemohon tidak berpuas hati dengan laporan bedah siasat si mati yang dilakukan oleh Hospital Serdang. Kemudiannya, pemohon meminta Pusat Perubatan Universiti Malaya ('PPUM') menjalankan bedah siasat kedua ke atas si mati. PPUM bersetuju tetapi pada 6 April 2009 pihak polis menggeledah Jabatan Patologi PPUM berikutan dengan waran geledah yang dikeluarkan oleh Mahkamah Majistret Petaling Jaya ('Mahkamah Majistret PJ') pada hari yang sama. Pihak polis menyita dokumen-dokumen, barangan

dan sampel-sampel beberapa bahagian tubuh si mati ('sampel-sampel tersebut') yang disimpan oleh doktor forensik di PPUM. Pemohon menyatakan bahawa sampel-sampel tersebut perlu dihantar ke sebuah makmal di Australia untuk ujian toksikologi sebelum bedah siasat kedua ke atas si mati boleh disempurnakan. Pada 12 Ogos 2009 pemohon telah memohon untuk semakan waran geledah tersebut yang dikeluarkan oleh Mahkamah Majistret PJ. Pemohon berhujah bahawa (i) pihak polis seharusnya menggunapakai s 51 Kanun Prosedur Jenayah ('KPJ') sebelum menggunakan waran geledah; (ii) bedah siasat kedua tersebut dimohon dan dibayar oleh keluarga si mati; (iii) waran geledah tersebut telah dikeluarkan secara salah kerana bedah siasat kedua masih lagi belum selesai; dan (iv) tugas seorang majistret mengeluarkan waran geledah tersebut merupakan fungsi kehakiman dan bahawa majistret tersebut telah khilaf apabila mengeluarkan waran geledah tersebut. Walau bagaimanapun, pendakwa raya menyatakan, antara lain, (i) bahawa waran geledah bertarikh 6 April 2009 tersebut dikeluarkan berikutan dengan s 54(1)(a) KPJ; (ii) bahawa waran geledah tersebut telah dilaksana dan digunakan menurut tempoh terhad yang dikenakan ke atas waran geledah tersebut; (iii) permohonan pemohon dibuat di bawah s 413 KPJ dan oleh itu penyitaan oleh pihak polis berikutan dengan waran geledah tersebut telah dilaporkan kepada majistret; dan (iv) bahawa PPUM merupakan pemilik yang sah dan sepatutnya untuk dipohon bagi pemulangan kesemua sampel yang disita di bawah waran geledah tersebut. Telah direkodkan di Mahkamah Majistret PJ bahawa waran geledah di bawah s 54(1)(a) KPJ ditandatangani oleh Pendaftar Mahkamah Sesyen Petaling Jaya ('pendaftar') pada 6 April 2009. Permohonan pihak polis untuk waran geledah tersebut ditujukan kepada Mahkamah Majistret PJ. Saman tersebut diserahkan kepada Ketua Pengarah PPUM dan seorang doktor agar menyerahkan dokumen-dokumen yang dipohon oleh pihak polis. Walau bagaimanapun, PPUM dan doktor tersebut gagal mematuhi kehendak saman tersebut atas alasan bahawa dokumen-dokumen tersebut merupakan dokumen-dokumen yang dilindungi. Pihak pendakwaan kemudiannya memohon waran geledah tersebut di bawah s 54(1)(a) KPJ.

Diputuskan, membenarkan sebahagian permohonan:

(1) Tiada rekod yang menunjukkan bahawa Majistret Kelas Pertama PJ telah melaksanakan fungsi kehakimannya di bawah s 54(1)(a) KPJ, bagi memutuskan sama ada wujudnya alasan untuk mempercayai bahawa saman di bawah s 51 KPJ tidak dipatuhi. Pendaftar yang telah menandatangani waran geledah tersebut telah bertindak dalam kapasitinya sebagai majistret kelas kedua dan oleh itu, mempunyai kuasa untuk mengeluar dan menandatangani suatu waran geladah di bawah s 83(b) bersama dengan s 83(a) Akta Mahkamah Rendah 1948 (lihat perenggan 26 & 33).

(2) Pendaftar tersebut telah melaksanakan dengan sepatutnya fungsi kehakimannya sebagai seorang majistret kelas kedua di bawah s 54(1)(a) KPJ. Pendaftar tersebut telah mengaplikasikan minda kehakimannya ke atas permohonan pihak polis sebelum memutuskan untuk mengeluarkan waran geledah tersebut kerana beliau menambah dua syarat ke atas waran geledah tersebut iaitu; (i) penggeledahan dan penyitaan haruslah dilaksanakan dalam masa tiga hari dari 6 April 2009; dan (ii) setelah penggeledahan tersebut pihak polis harus mengemukakan kesemua barangan yang disita ke hadapan mahkamah majistret. Permohonan untuk semakan ditolak kerana perintah pendaftar mengeluarkan waran geledah tersebut adalah betul, sah dan wajar (lihat perenggan 36–37).

(3) Seksyen 413 KPJ yang digunapakai oleh pihak pendakwaan tidak terpakai dalam situasi kes ini. Pihak pendakwaan khilaf dalam hujahannya yang menyatakan bahawa barangan dalam kes ini telah dilaporkan kepada majistret yang mana kemudiannya mengarahkan pihak polis menyimpan barangan tersebut sehingga siasatan sempurna. Walau bagaimanapun, tiada bukti bahawa majistret telah memerintahkan pihak polis untuk menyimpan barangan yang telah disita tersebut direkodkan (lihat perenggan 38).

(4) Adalah jelas bahawa pihak polis tidak mematuhi kehendak waran geledah yang ditandatangani oleh pendaftar tersebut untuk menggeledah dan 'produce the same forthwith before the Magistrate's Court'. Fakta-fakta menunjukkan bahawa dalam masa dua hari penggeledahan tersebut iaitu 8 April 2009, seorang pegawai polis telah memaklumi pendaftar tersebut akan tindakannya tetapi dia tidak mengemukakan kesemua barangan tersebut ke mahkamah majistret. Adalah disahkan bahawa barangan yang disita tidak dikemukakan ke mahkamah majistret. Pegawai polis berkenaan telah memulangkan waran geledah tersebut bersama dengan laporan-laporan polis berikutan dengan syarat-syarat di bahagian akhir yang dinyatakan dalam waran geledah tersebut. Walau bagaimanapun, pegawai polis tersebut gagal mematuhi syarat-syarat paling kritikal atau penting dalam waran geledah tersebut, iaitu untuk mengemukakan kesemua barangan yang disita ke hadapan mahkamah majistret dalam masa tiga hari dari tarikh penggeledahan dan penyitaan iaitu 6 April 2009. Oleh itu, pihak polis telah bertindak bertentangan dengan syarat-syarat dalam saman tersebut (lihat perenggan 48–49).

(5) Pemohon mempunyai locus standi apabila memohon sampel-sampel bahagian tubuh si mati memandangkan dia merupakan ibu kepada si mati. Sampel-sampel bahagian tubuh tersebut adalah milik anak lelaki pemohon yang telah meninggal dunia. Kesemua dokumen atau barangan yang disita adalah berkaitan dengan bedah siasat kedua si mati

dan pemohon bukannya memohon agar barangan disita tersebut dipulangkan kepadanya. Pemohon memohon agar sampel-sampel dan barangan yang disita tersebut dipulangkan kepada Jabatan Patologi, PPUM bagi membolehkan prosedur bedah siasat kedua tersebut sempurna dan mengeluarkan laporan bedah siasat si mati kepada pemohon (lihat perenggan 57).

(6) Pihak polis harus mengemukakan ke mahkamah majistret di hadapan seorang majistret kelas pertama kesemua sampel atau spesimen dan barangan yang disita berikutan dengan waran geledah tersebut bagi suatu keputusan sama ada sampel-sampel atau spesimen-spesimen dan barangan tersebut harus dipulangkan kepada PPUM atau pihak polis dibenarkan terus menyimpannya (lihat perenggan 59).]

Notes

For a case on requirements of search warrant, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) para 3252.

For cases on application for revision, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 3106–3117.

Cases referred to

Chong Chieng Jen v Mohd Irwan Hafiz bin Md Radzi & Anor [2009] 8 MLJ 364, HC (refd)

Ghani v Jones [1970] 1 QB 693 (refd)

Kah Wai Video Ipoh Sdn Bhd, Re [1987] 2 MLJ 459, HC (refd)

Melicio Fernandis v Mohan Nair (SB) AIR 1966 Goa 23; 1966 Cr LJ 1258 (refd)

Legislation referred to

Criminal Procedure Code ss 20, 51, 51(1), (2), 52(1), 54, 54(1), (1)(a), (b), (c), 57(2), 413

Criminal Procedure Code [IND] s 93(1)(a)

Subordinate Courts Act 1948 ss 77(1), 82, 83, 83(a), (b), 88, 92, Fourth Schedule

N Surendran (T Naraendran and M Manogaran with him) (Edwin Lim Suren & Soh) for the applicant.

Noorin Badaruddin (Tuan Isa bin Hassim and How May Ling with her) (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Yeoh Wee Siam JC:

APPLICATION

[1] On 12 August 2009 N Indra a/p P Nallathamby ('the applicant') made an application by letter ('the application') through her solicitors, Messrs

Edwin Lim Suren & Soh for a revision of the search warrant issued by the Petaling Jaya Magistrate's Court ('the PJ Magistrate's Court').

BRIEF FACTS

[2] Briefly, the facts as given by the applicant are as follows:

[3] The applicant is the mother of Kugan a/l Anathan ('Kugan' or 'the deceased') who died while under police custody on 21 January 2009.

[4] The applicant was dissatisfied with the first post mortem report on Kugan which was given pursuant to a post mortem conducted by the Serdang Hospital.

[5] The applicant then requested Pusat Perubatan Universiti Malaya ('PPUM') to conduct a second post mortem on Kugan, and which PPUM agreed to do so.

[6] On 6 April 2009, the police conducted a search on the Department of Pathology in PPUM following a search warrant that was issued by the PJ Magistrate's Court on the same day.

[7] During the search, the police seized, under the search warrant, documents, articles and samples or specimens of body parts of Kugan ('the samples') which were kept by the forensic doctor, Dr Prashant N Sambekar ('Dr Prashant') at PPUM.

[8] The applicant informed the court that the samples were required to be sent to a laboratory in Australia for toxicology tests before the second post mortem report on Kugan could be completed.

[9] Upon receiving the above application, I called for the records of the PJ Magistrate's Court regarding the matter.

[10] The application was fixed for hearing before me on 4 September 2009. On that day, the attorney general's chambers applied for a postponement on the ground that they were just notified by the Selangor State Deputy Public Prosecutor of the application two days before the hearing. I allowed an adjournment and fixed the application for hearing on 11 September 2009. On the application of learned counsel for the applicant on 4 September 2009, I also gave a court order directing the police concerned to preserve the specimens seized and to keep them in safe custody.

THE APPLICANT'S GROUNDS FOR REVISION

[11] Learned counsel for the applicant submitted, inter alia, as follows:

(a) The police should have used s 51 of the Criminal Procedure Code ('the CPC') first before applying for the search warrant.

(b) The second post mortem was requested, and paid for by Kugan's family. The police did not have a right to seize the results of the second post mortem by a search warrant which should not have been issued in the first place.

(c) The search warrant was wrongly issued since the second post mortem had not been completed yet. The seizure has resulted in the second post mortem report not being completed.

(d) The function of the magistrate in issuing the search warrant is a judicial function and the magistrate had erred in issuing the search warrant.

REPLY SUBMISSIONS OF THE DEPUTY PUBLIC PROSECUTOR ('THE DPP')

[12] Briefly, the learned DPP, on behalf of the public prosecutor, submitted, inter alia, as follows:

(a) The search warrant dated 6 April 2009 has been issued under s 54(1)(a) of the CPC. Section 54 confers wide powers to a court when issuing search warrants.

(b) Section 57(2) of the CPC provides that every search warrant shall remain in force for a reasonable number of days specified in the search warrant. The search warrant had already been executed and spent according to the limitation period imposed on the search warrant. Therefore, the application for an order that the search warrant be quashed and/set aside is therefore academic and no longer a living issue to be decided by the High Court.

(c) The application made by the applicant is one made under s 413 of the CPC. The property seized by the police pursuant to the search warrant had been reported to the magistrate. The magistrate's court rightly ordered that the police were to hold the property since investigation is not over.

(d) Only the rightful party to the application proceedings can apply under s 413 of the CPC to the magistrate for the police to deliver possession of the things. Here, the PPUM is the legitimate and appropriate owner to apply for the return of the documents, photographs and other materials seized under the search warrant. The applicant cannot appear

on behalf of PPUM when PPUM has not made any formal claim of possession of the materials seized. The applicant cannot apply for an order that the articles seized be returned to the Department of Pathology of PPUM when PPUM is not a party to the application.

FINDINGS AND DECISION

[13] The PJ Magistrate's Court records showed that a search warrant, using Form 8 under s 54(1)(a) of the CPC, was signed by the registrar of the PJ Sessions Court ('the registrar') on 6 April 2009 on the basis of a letter of application dated 6 April 2009 signed by ASP Mohd Marzukhi bin Mohd Mokhtar ('ASP Marzukhi'), Pegawai Penyiasat Kanan Jenayah, on behalf of the Head of the Criminal Investigation Department, Selangor ('the application by the police'). The application by the police for a search warrant to be issued was addressed to the magistrate of the PJ Magistrate's Court. In the application by the police, it was stated that a post mortem (A26/09) was conducted by Dr Prashant at PPUM on 25 January 2009. The police required a search warrant to search the premises of PPUM and the Forensic Department there to obtain certain items which were required for investigations regarding Kugan's death in connection with the police report, USJ 8 Rpt: 764/09. In the annexure to the application, the police listed the items required for further and more effective investigation as follows:

(a) Samples for histopathology tests

70 body parts of the deceased Kugan were listed here.

(b) Samples for toxicology and/or drug tests

(i) blood;

(ii) urine;

(iii) stomach contents;

(iv) urine for myoglobinuria.

(c) Photographs

(i) original CD of photographs recorded;

(ii) memory card of photographs recorded.

(d) Record

(i) original draft of the record of post mortem A26/09 (in handwriting).

[14] ASP Marzukhi made four police reports on 6 April 2009 regarding the results of the search made under the search warrant and the items seized ie Pantai Rpt No 003375/09, 003380/09, 003385/09 and 003391/09.

[15] The two main sections governing the issue of a search warrant in this application are s 51 and 54(1) of the CPC.

[16] Section 51(1) and (2) of the CPC provide as follows:

> 51 Summons to produce document or other things
>
> (1) Whenever any Court or police officer making a police investigation considers that the production of any property or document is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code by or before that Court or officer, such Court may issue a summons or such officer a written order to the person in whose possession or power such property or document is believed to be requiring him to attend and produce it or to produce it at the time and place stated in the summons or order.
>
> (2) Any person required under this section merely to produce any property or document shall be deemed to have complied with the requisition if he causes the property or document to be produced instead of attending personally to produce the same.

[17] Section 54(1) of the CPC provides as follows:

> 54 When search warrant may be issued
>
> (1) Where —
>
> (a) any Court has reason to believe that a person to whom a summons under section 51 or a requisition under subsection 52(1) has been or might have been addressed will not or would not produce the property or document as required by the requisition;
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> (b) that property or document is not known to the Court to be in the possession of any person; or
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> (c) the Court considers that the purposes of justice or of any inquiry, trial or other proceeding under this Code will be served by a general search or inspection,
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> the Court may issue a search warrant and the person to whom that warrant is directed may search and inspect in accordance with the warrant and the provisions herein contained.

[18] The search warrant in this case was issued under s 54(1)(a) of the CPC, and the prosecution in its submissions has confirmed it. However, reading both s 51 and s 54 of the CPC together, I agree with learned counsel's submission that s 51 of the CPC must be applied first before resorting to the use of s 54(1)(a) of the CPC. The law envisages that even before the police can be granted a search warrant to conduct any search in any private premise, first of all, the police officer making a police investigation must apply to the court for a summons, or issue an order to any person to produce any property or document. Such person shall be deemed to have complied with the summons under s 51(2) of the CPC if he produces or cause to produce such property or document. From the affidavit of ASP Marzhuki affirmed on 14 September 2009 and filed in this court on 16 September 2009 ('the affidavit'), it is confirmed that before ASP Marzhuki applied for a search warrant under s 54(1)(a) of the CPC, he did serve a summons under s 51(1) of the CPC to the Director-General of PPUM to supply the documents required (see exh MM-2(b) of the affidavit). He also served an order to produce documents under s 51 of the CPC to Dr Prashant (see exh MM-2(d) of the affidavit). Unfortunately, the PPUM and Dr Prashant did not comply within such summons or order to produce on the ground that the documents required are privileged documents under the law relating to evidence (see exhs MM-3(a), MM-3(b) and MM-3(c) of the affidavit). That was why ASP Marzhuki later applied for the search warrant under s 54(1)(a) of the CPC.

[19] A search warrant can only be issued under s 54(1) of the CPC under any of the three circumstances stated in paras (a)–(c) of the same section.

[20] For the purpose of this case, it is clear that only s 54(1)(a) of the CPC is relevant. The learned DPP has also confirmed that the search warrant in this case was issued under s 54(1)(a) of the CPC.

[21] Section 54(1)(a) only applies if the court has 'reason to believe' that the person required by the summons under s 51 or a requisition under s 52(1) of the CPC would not produce the property or document.

[22] When the application for the search warrant was made to the PJ Magistrate's Court, the application must be brought before the magistrate for him to decide whether the court has 'reason to believe' that the person under s 51 of the CPC would not produce the property or document. This is a judicial function, as submitted by learned counsel, and such function must be exercised only by the magistrate.

[23] In *Melicio Fernandis v Mohan Nair (SB)* AIR 1966 Goa 23; 1966 Cr LJ 1258 at pp 1258 and 1260 it is stated:

The issue of search warrant is normally the judicial function of the magistrate. The words 'reason to believe' coupled with other words contemplate an objective determination based on intelligent care and deliberation involving judicial review as distinguished from a purely subjective consideration. This function being judicial, it necessarily follows that the magistrate has to apply his mind judicially …

The main reason for setting aside the order are (i) that it discloses no reason; (ii) that the learned magistrate did not ascertain whether there was sufficient material to justify the issue of search warrant which, it seems, was issued automatically for the mere asking; and (iii) that except for the bare statement of the complainant no other particulars of criminal breach of trust were given.

[24] In *Sohoni's The Code of Criminal Procedure*, 1973 (18th Ed) at p 386, in relation to s 93(1)(a) of the Indian Code of Criminal Procedure which is in pari materia with s 54(1)(a) of the Malaysian CPC, inter alia, it is stated:

It is a condition precedent to the issue of a search warrant under clause (a) of subsection (1) that the Court must have reason to believe that the person against whom the search warrant is issued is not likely to produce the document or thing in his possession as required by a summons on order under section 91 or a requisition under section 92(1), served upon him. It is the duty of the Court in the first instance to consider if a summons to produce would not have the desired effect…

… The Magistrate must apply his judicial mind to the question and must satisfy himself that the issue of the warrant is necessary and that the requirements of the law for the issue of the warrant are present. He must see whether there are sufficient materials before him to justify the drastic action which he is invited to take. When it appears that a Magistrate has not applied his mind in this way and when it appears that action has been taken on insufficient material, the search warrant is illegal and the High Court will interfere.

[25] In *Chong Chieng Jen v Mohd Irwan Hafiz bin Md Radzi & Anor* [2009] 8 MLJ 364, the High Court stated as follows:

… there is no compromise that there must be credible information before a magistrate issues the warrant or in the absence of such information then 'reason to believe' that incriminating evidence connected to an offence is to be found in the place stipulated in the warrant …. The requirement for 'information' and 'reason to believe' is mandatory because the execution of the warrant will definitely result in the invasion of the privacy and property of the owner of the premises so named …

… the magistrate concerned must ensure that the information laid before him is one which possessed credibility and 'reason to believe' means good and cogent reasons which supports the belief that incriminating evidence of an offence would be found in the premises stated in the warrant.

[26] In the present case, there is nothing on record to show that the PJ First Class Magistrate exercised his judicial function under s 54(1)(a) of the CPC, to decide whether there was any 'reason to believe' that the summons under s 51 of the CPC has not been complied with. In fact, there is no record at all to prove that the PJ First Class Magistrate issued the search warrant under s 54(1)(a) of the CPC.

[27] The records show that it was the registrar who signed the search warrant. The question that arose now is whether the registrar has the power to issue and sign the search warrant.

[28] By virtue of s 77(1) and the Fourth Schedule of the Subordinate Courts Act 1948 ('the SCA'), the registrar of the subordinate court is an ex officio second class magistrate.

[29] The powers of a registrar, acting in his capacity as a second class magistrate, are provided in ss 82 and 83 of the SCA which read as follows:

> 82 General powers and jurisdiction of Magistrates' Courts and Magistrates
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> A Magistrates' Court constituted under this Act shall, for all purposes, be deemed to be the Court of a First Class Magistrate, and shall have all the powers and jurisdiction conferred on a First Class Magistrate by this Act or any other written law, and any Magistrate of either class within the local limits of whose jurisdiction the Court is situate may exercise the powers and jurisdiction of the Court:
>
> Provided that a Second Class Magistrate shall not hold any preliminary inquiry or proceed to the final trial and determination of any cause or matter which is not within the jurisdiction conferred upon him by section 88 or section 92 or by any other written law.
>
> 83 Preliminary process and interlocutory orders
>
> Without prejudice to the generality of section 82 or to section 5 —
>
> (a) any summons, writ, warrant or other process, whether civil or criminal, issued by a Magistrates' Court may be signed by a Magistrate of either class within the local limits of whose jurisdiction the Court is situate notwithstanding that it is or was not within the competency of the Magistrate to try and determine the cause or matter to which the summons, writ, warrant or other process relates;
>
> (b) in any cause or matter, whether civil or criminal, before a Magistrates' Court any Magistrate of either class within the local limits of whose jurisdiction the Court is situate may make any interlocutory or interim order not involving the final trial and determination of the cause or matter including, but without prejudice to the generality of

the foregoing, orders relating to adjournments, remands and bail, execution of judgments and decrees, and transfers of proceedings to Sessions Courts.

[30] For the purpose of this case, from a reading of s 82 of the SCA, it is clear that a second class magistrate's jurisdiction is only limited to the jurisdiction conferred upon him by ss 88 or 92 of the SCA. Section 92 has no relevance to this case since it governs the civil jurisdiction of a second class magistrate. Section 88 empowers the second class magistrate to try offences punishable with imprisonment not exceeding 12 months or which are punishable with fine only. Nowhere in s 82 or 88 of the SCA does it provide the second class magistrate with the power to issue a search warrant.

[31] Section 83(a) of the SCA provides for a warrant, inter alia, to be signed by a magistrate of either class. It does not provide the power to issue a warrant.

[32] Section 83(b) of the SCA gives the power to a magistrate of either class to make any interlocutory or interim order for any civil or criminal matter.

[33] In my opinion the registrar, acting in her capacity as a second class magistrate, is empowered to issue and sign a search warrant under s 83(b) read together with s 83(a) of the SCA.

[34] The records show that the registrar considered the application made by the police for the search warrant on 6 April 2009. Such application stated the reason for the application ie the police were investigating the death of Kugan based on the police report, USJ 8 Rpt: 764/09, where Kugan died in police custody on 20 January 2009 after being detained by the police on 14 January 2009 for theft of luxury cars in connection with USJ Rpt: 298/09. The police in the application informed the PJ Magistrate's Court that Dr Prashant of PPUM had conducted a post mortem (A26/09) on the deceased, Kugan, and several samples had been taken from the body of the deceased to ascertain the cause of death of the deceased. The police also stated that the samples and original record of A26/09 and the CD of the original photographs which were recorded together with the memory card were required by the police for more thorough and effective investigations. The samples required were all listed in the annexure to the application for the search warrant.

A **[35]** The registrar then issued the search warrant under s 54(1)(a) of the CPC on the ground that there was reason to believe that the PPUM and Dr Prashant would not produce the documents or property required.

B **[36]** I found that the registrar did exercise the judicial function of a second class magistrate under s 54(1)(a) of the CPC properly. She did apply her judicial mind to the application by the police before deciding to issue the search warrant. This is evidenced by the fact that she imposed two additional conditions on the police in the search warrant ie:

C (a) the search and seizure must be conducted within three days from 6 April 2009; and

(b) after the search and seizure the police were to produce forthwith all articles seized before the magistrate's court.

D

[37] Therefore, I was satisfied that the registrar's order in issuing the search warrant was correct, legal and proper. That being the case, there was no justification for me to exercise my revisionary powers under Chapter XXXI of the CPC. Accordingly, I dismissed the application for revision.

E

[38] Section 413 of the CPC, which was cited and relied upon by the prosecution does not apply to the situation in this case. Section 413 of the CPC only applies where there is property seized under s 20 of the CPC or
F which were suspected to have been stolen or found under suspicious circumstances ie where goods are seized by the police from a person arrested and such property is reported to the magistrate for an order for delivery of the property to the person whom the magistrate thinks fit to take delivery of the same. With respect, the prosecution also erred in its submissions to state that
G the property in this case had been reported to the magistrate who then ordered the police to hold the property until investigation is over. On record, there was no proof that the magistrate had ordered the police to hold the property seized. That was why on the first date of the hearing of the application, on 11 September 2009, I had ordered the prosecution to file an
H affidavit of ASP Marzukhi on the matter or show proof that there was such order given by the magistrate.

[39] Regarding the learned DPP's submission that the search warrant was already spent after its execution on 6 April 2009, I found that certain
I conditions in the search warrant had yet to be complied with by the police.

[40] The search warrant in Form 8 issued under s 54(1)(a) of the CPC, and addressed to ASP Marzukhi, inter alia, states as follows:

Whereas information has been laid [or complaint has been made] before me of the commission [or suspected commission] of the offence of 302 KK and it has been made to appear to me that the production of the articles specified in the Schedule below is essential to the enquiry now being made [or about to be made] into the said offence [or suspected offence]: spt di lampiran ms 1–3.

This is to authorise and require you within the space of 3 days from the date hereof to search for the said articles specified in the Schedule below in the Pusat Perubatan Universiti Malaya, Lembah Pantai, 59100 KL (describe the house or place, or part thereof, to which the search is to be confined), and, if found *to produce the same immediately before the Magistrate's Court; returning this warrant, with an indorsement certifying what you have done under it, immediately upon its execution*. (Emphasis added.)

[41] From the above wording in the search warrant, it is clear that the police are required to produce forthwith before the magistrate's court whatever property or document, that is listed in pp 1–3 of the annexure to the application by the police for the search warrant, that has been searched and seized from the PPUM. However, this was not done.

[42] ASP Marzukhi in his affidavit disclosed that after executing the search warrant, and after seizure of the samples of blood, urine and stomach contents of the deceased, he had ordered to be sent on 6 April 2009 at 2.17pm such samples to the Jabatan Kimia Malaysia in Petaling Jaya for toxicology tests to trace the presence of alcohol, blood and poison and to trace myoglobin contents (see para 12 of the affidavit).

[43] On the same day at 3.45pm ASP Marzukhi was informed that the test to trace myoglobin contents could not be done by the Jabatan Kimia Malaysia. So ASP Marzukhi directed his officer to take back the urine samples and send them to the Institute for Medical Research ('IMR') (see para 13 of the affidavit).

[44] ASP Marzukhi, in his affidavit, confirmed that the whole search and seizure process was completed on 6 April 2009 at about 4.30pm. The articles seized were brought back to his office in IPPD Petaling Jaya (see para 14 of the affidavit).

[45] On 8 April 2009 at about 9.50am, ASP Marzukhi informed the registrar of the actions that he had taken and he returned the search warrant together with the police reports that he had made (see para 17 of the affidavit).

[46] Subsequently ASP Marzukhi received the reports on the samples from Jabatan Kimia Malaysia and IMR on 21 April 2009 and 24 April 2009 respectively (see paras 18 and 19 of the affidavit).

[47] At the time of the affirmation of the affidavit by ASP Marzukhi, the samples and all articles seized were in the custody of the police except the urine samples which had been sent again to IMR for further police investigation (see para 20 of the affidavit).

[48] From ASP Marzukhi's affidavit, it is clear that he did not comply with the requirement in the search warrant signed by the registrar ie within three days from 6 April 2009 to search and 'produce the same forthwith before the magistrate's court'. The facts showed that within two days of the seizure ie on 8 April 2009, ASP Marzukhi informed the registrar of his actions but he did not produce all the items before the magistrate's court. An inquiry by my senior assistant registrar with the registrar's office also confirmed that the articles seized were not produced before the magistrate's court. ASP Marzukhi did return the search warrant together with the police reports in compliance with the last part of the conditions stated in the search warrant. However, he failed to comply with the most critical or material part of the conditions in the search warrant ie to produce all articles seized before the magistrate's court within three days from the search and seizure on 6 April 2009.

[49] The police, by not producing the articles seized before the magistrate, had acted in contravention of the conditions in the summons.

[50] In *Re Kah Wai Video Ipoh Sdn Bhd* [1987] 2 MLJ 459, Edgar Joseph Jr J spelt out very clearly the common law position regarding police powers on search and seizure:

> As regards the common law extension of police powers to seize articles which do not fall within the precise limits of the search warrant issued, I find support in the following passages in the judgment of Denning MR in *Ghani v Jones* [1970] 1 QB 693 at pp 708–709:
>
> > What is the principle underlying these instances? We have to consider, on the one hand, the freedom of the individual. His privacy and his possessions are not to be invaded except for the most compelling reasons. On the other hand, we have to consider the interest of society at large in finding out wrongdoers and repressing crime. Honest citizens should help the police and not hinder them in their efforts to track down criminals. *Balancing these interests, I should have thought that, in order to justify the taking of an article, when no man has been arrested or charges, these requisites must be satisfied*:

First: The police officers must have reasonable grounds for believing that a serious offence has been committed — so serious that it is of the first importance that the offenders should be caught and brought to justice.

Second: The police officers must have reasonable grounds for believing that the article in question is either the fruit of the crime (as in the case of stolen goods) or is the instrument by which the crime was committed (as in the case of the axe used by the murderer) or is material evidence to prove the commission of the crime (as in the case of the car used by a bank raider or the saucer used by the criminals in the Great Train robbery).

Third: The police officers must have reasonable grounds to believe that the person in possession of it has himself committed the crime, or is implicated in it, or is accessory to it, or at any rate his refusal must be quite unreasonable.

Fourth: *The police must not keep the article, nor prevent its removal, for any longer than is reasonably necessary to complete their investigations or preserve it for evidence. If a copy will suffice, it should be made and the original returned. As soon as the case is over, or it is decided not to go on with it, the article should be returned.*

Finally: The lawfulness of the conduct of the police must be judged at the time and not by what happens afterwards.

(Emphasis added.)

[51] In Archibald on *Pleading, Evidence and Practice in Criminal Cases*, (42nd Ed) at p 1133, in relation to the execution of a search warrant, it is, inter alia, stated:

(2) The police must not keep the article or prevent its removal for any longer than is reasonably necessary to complete their investigations or to preserve it as evidence.

[52] In this case, from 6 April 2009 until the date of hearing of this application on 11 September 2009, and the date for decision of this court on the application on 2 October 2009, the police had not complied with the magistrate court's order as contained in the search warrant ie to produce the articles seized forthwith before the magistrate.

[53] On 11 September 2009 when she was asked by the court as to how long the police intended to keep the samples and articles seized, the learned DPP informed the court that she did not know since it was an investigation matter within the jurisdiction of the police.

A **[54]** On 2 October 2009, just before this court delivered its decision on the application, the learned DPP updated the court that since on the day before ie 1 October 2009, a police officer had already been charged in the sessions court for the offence committed against the deceased, the police would continue to keep all samples and articles seized for the purpose of using them
B as exhibits in the prosecution proceedings.

[55] Learned counsel for the applicant informed the court that the charging of the police officer does not made any difference to this application since the court still has to decide on the question whether the search warrant
C was properly issued. In any case, the applicant was not satisfied with the fact that only one police officer was charged for the particular offence. Therefore, the applicant would still pursue the matter and would want the samples to be sent to Australia for tests.

D **[56]** The submissions of the prosecution that the search warrant has already been spent do not hold water. Clearly, the search warrant is still valid and alive considering that the police have yet to comply with the remaining part of the order contained in the search warrant about producing forthwith the
E articles seized before the magistrate's court.

[57] Regarding the prosecution's submission that it should be the PPUM, who are the owners of the articles seized, who should make this application and claim the articles, and not the applicant, I am of the view that the
F applicant has locus standi since she is the mother of the deceased. The samples of the body parts belong to the applicant's deceased son. All other documents or articles seized relate to the second post mortem of the deceased. The applicant is not seeking that the articles seized be returned to her. She is only applying for the samples and articles seized to be returned to the
G Department of Pathology, PPUM, so that PPUM can complete the second post mortem procedures and issue the final post mortem report on the deceased for the applicant. After all, the applicant is the one who applied to the PPUM in the first place for the second post mortem to be conducted.

H **[58]** Since the police had not complied with the condition contained in the search warrant that upon search of the PPUM premises and seizure of the samples and articles, the police are to produce the same forthwith before the magistrate's court, I ordered that there should be such compliance.

I **[59]** Accordingly, on 2 October 2009, I ordered that on 9 October 2009, the police are to produce before the magistrate's court, before a first class magistrate, all samples or specimens and articles seized pursuant to the search warrant for a decision as to whether such samples or specimens and articles are to be returned forthwith to the PPUM or to allow the police to have

continued safe custody of the same for use later as exhibits in the prosecution proceedings regarding the police officer charged on 1 October 2009 for the offence in relation to the deceased's death.

Application allowed in part.

Reported by Mashrifah Ravendran